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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellants, pursuant to United States Supreme Court Rule 13(2) and 15, file this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise such jurisdiction in this case.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal.App.3d 430, 149 Cal.Rptr. 519, and is attached hereto as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) as being an appeal which draws into question the validity of California Government Code §845.8(a) *infra*, page 4, on the ground that as construed it is repugnant to the Constitution of the United States.

Appellants seek damages from state officials for the wrongful death of their daughter. Demurrers to their Complaint were sustained on the ground that California Government Code §845.8(a) provides absolute immunity from civil liability for causing a loss of life because "there is a rational relationship between the state's purposes and the statute."

The appeal herein is from a final judgment decided and filed by the Court of Appeal for the State of California, Fourth Appellate District, Division One, on September 22, 1978. On November 15, 1978, Appellants' Petition for Hearing in the Supreme Court of the State of California was denied. Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeal of the State of California, Fourth Appellate District, Division One, on February 5, 1979.

As the Court of Appeal of the State of California explicitly rejected Appellants' challenge to the constitutionality of California Government Code §845.8(a), this matter is appropriately brought to this Court by appeal. *Sibron v. New York* 392 U.S. 40 (1968).

In the event that the Court does not consider appeal the proper mode of review, Appellants request that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

ADDITIONAL GROUND OF JURISDICTION

The Appellants also contend that the judgment is founded on another error, which though it involves a question not subject to review by this Court of appeal, nevertheless deprived the Appellants of a fair hearing. The Court of Appeal of the State of California found that Respondents had absolute immunity from suit in an action brought under 42 U.S.C. §1983. This error is included in the statement of the questions presented by the appeal hereinafter set forth. If this were the only error complained of, Appellants would be limited to a petition for writ of certiorari under 28 U.S.C. §1257(3). It is included on this appeal under the authority of *Prudential Insurance Company v. Check*, 259 U.S. 530, 547 (1922) and *Flournoy v. Wiener*, 371 U.S. 253, 263 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves California Government Code §845.8(a) which states:

> "Neither a public entity nor a public employee is liable for: (a) any injury resulting from determining whether to parole or release a prisoner, or from determining the terms or conditions of his parole or release, or from determining whether to revoke his parole or release."

This case also involves 42 U.S.C. §1983 which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Whether California Government Code §845.8(a), When Construed To Grant Absolute Immunity To State Officials From Civil Liability For Their Acts Which Caused A Loss Of Life Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The Constitution Of The United States.

II. Whether State Officials Have Absolute Immunity From Civil Liability In An Action Brought Pursuant To U.S.C. §1983 For Acts Which Caused A Loss Of Life.

STATEMENT OF THE CASE

RICHARD JUNE-JORDAN THOMAS was convicted on December 12, 1969 of the attempted forcible rape of two young females at knifepoint in Tecolote Canyon in San Diego, California. From January to July, 1970, THOMAS was committed to the Atascadero State Mental Hospital for observation where he was designated as a "Medically Disordered Sex Offender" not amenable to treatment. He was subsequently sentenced by the Honorable LELAND C. NEILSEN of the San Diego Superior Court for a period of six months to twenty years in April, 1970, with that court making specific comment that THOMAS should not be paroled. Although he had been designated as a "mentally disordered sex offender," had been adjudged by the Atascadero State Mental Hospital as "not amenable to treatment," and in fact had received no treatment while incarcerated, THOMAS was subsequently paroled on March 10, 1975. THOMAS was

paroled even though he admitted to authorities that he did not feel himself ready for parole and feared actions he might take if he in fact were paroled. THOMAS' parole was subject to special conditions, including the condition that he regularly appear at a "parole out-patient clinic." In fact, THOMAS was not supervised, and the conditions which were attached to his parole were not met, and he did not regularly appear at his designated "parole out-patient clinic."

RICHARD JUNE-JORDAN THOMAS subsequently kidnapped and murdered MARY ELLEN MARTINEZ, age 15, on Ausgust 1, 1975, in the same Tecolote Canyon of San Diego, California. THOMAS was duly convicted and on April 13, 1976, the Honorable EDWARD T. BUTLER sentenced THOMAS to death in the San Quentin state prison gas chamber.

Appellants' original Complaint for Damages for Wrongful Death and Civil Rights Violation (C.T. 18) was filed with the San Diego Superior Court on May 25, 1976. The Honorable LOUIS M. WELSH filed a Minute Order (C.T. 94) with the Court on September 1, 1976, which sustained Respondents' Demurrer (C.T. 18) as to causes of action I, II, III, IV, V and VI, with leave to amend causes of action I and VI.

Appellants' First Amended Complaint (C.T. 97) repleads causes of action II, III, IV and V verbatim from their original Complaint (C.T. 1) and incorporates amended portions of causes of action I and VI. The latter two causes of action were subsequently demurred to by Respondents on October 14, 1976, and the Honorable DOUGLAS R. WOODWORTH sustained Respondents' Demurrer (C.T. 18) as to those causes of action on November 8, 1976, without leave to amend.

Appellants then appealed from the Notice of Entry of Judgment (C.T. 132) of November 24, 1976 on December 20, 1976. The Court of Appeals of the State of California, Fourth Appellate District, Division One, affirmed the lower Court's ruling on September 22, 1978. The Supreme Court of the State of California denied Appellants' Petition for Hearing on November 15, 1978 and the judgment of the Court of Appeals was entered on November 27, 1978.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Constitutionality of Government Code §845.8(a)

Appellants' Complaint seeks damages for the wrongful death of their daughter and for the deprivation of her right to life without due process. The Complaint alleges malice and bad faith on the part of Respondents.

Respondents demurred on the ground that Government Code §845.8(a) provided them with absolute immunity even for their acts done in bad faith or with malice. Appellants' response stated:

> "If, however, this court should find that Government Code §845.8(a) does grant total immunity in [the] situations enumerated above, then Plaintiffs contend that Government Code §845.8(a) is unconstitutional as applied to them in that: (a) MARY ELLEN MARTINEZ had a federally protected right to life under the Constitution of the United States, (b) the state of California, through the acts of its employees, proximately caused the

death of MARY ELLEN MARTINEZA, (c) as applied to Plaintiffs, Government Code §845.8(a) resulted in the deprivation of life without due process in that it authorized, condoned, and encouraged the negligent and/or willful, wanton and malicious acts of the defendant employees." (C.T. 58)

The trial court rejected this contention finding Respondents' immunity to be absolute:

> "It is clear that a public employee is not liable for an injury resulting from his discretionary acts, even if the discretion is abused. . . ." (C.T. 94)

The Court of Appeal stated Appellants' contentions as it understood them:

> "MARTINEZ says the statute, Government Code §845.8(a) is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in MARY ELLEN's death, and thus requires a compelling state interest." (Appendix "A", pages 7-8)

The court squarely rejected Appellants' contention:

> ". . . The legislature has broad power to control governmental tort liability . . . The stated purpose of §845.8(a) is to allow correctional personnel to make determinations of release or parole unferrered by any fear of tort liability . . . There is a rational relationship

> between the state's purposes and the statute . . . There is no liability here. . . ." (Appendix "A", page 8)

II. Absolute Immunity Of Officials From Suit Under Civil Rights' Act 42 U.S.C. §1983.

Plaintiffs' Complaint specifically alleges that the malicious acts of Respondents caused the death of MARY ELLEN MARTINEZ and thereby deprived her of the fundamental right of life secured against deprivation by state action without due process by the Constitution of the United States. The trial court found official immunity an absolute bar to an action brought under 42 U.S.C. §1983:

> "The Federal Civil Rights' Act, 42 U.S.C. §1983 provides wrongful death benefits '. . . if such is permitted by state law.' (Plaintiffs' Memorandum of Points and Authorities, page 15) Since this court concludes that state law does not permit this action, none accrues under federal law." (C.T. 95-96)

The Court of Appeal acknowledged the issue before it as follows:

> "MARTINEZ's fifth cause of action alleges violation of the Federal Civil Rights Act . . . saying the acts of individual Respondents . . . caused and deprived MARY ELLEN of her life and liberty. He points out that governmental immunity is not an absolute bar to such a suit . . . He argues that public policy considerations support the application of a restricted immunity with regard to civil rights actions

> brought by injured citizens . . . An official who acts maliciously should be liable . . . The right to life and physical safety may be more important than immunity." (Appendix "A", pages 5-7)

The court clearly rejected this argument:

> "As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the Civil Rights Act." [Opinion, p. 7]

A timely Petition for Hearing was denied by the Supreme Court of California on November 15, 1978, and the judgment of the Court of Appeal was entered on November 27, 1978.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I

PRELIMINARY STATEMENT

The incidence of violent crimes in our country is among the most significant social issues of our day. Of particular concern are those violent crimes committed by convicted felons released on parole as rehabilitated. The overwhelming evidence is to the effect that our prisons are totaly ineffective in rehabilitation. Indeed, it seems that prison effectively turns first-time offenders into confirmed, life long criminals. A shocking proportion of all violent crimes is committed by persons who have been convicted repeatedly of such crimes but who are routinely releasted as rehabilitated after a fraction of their sentence is served.

In light of figures showing astronomically high rates of recidivism, it is outrageous to expect the public alone to bear the risk that these rehabilitative efforts will fail without holding parole officials to a "good faith" requirement.

Appellants acknowledge the heavy burden of proof that accompanies an action brought against officials covered by a qualified immunity. Whatever atrocities may be visited on innocent members of the public by criminals released by parole officials in the negligent performance of their duties is without redress; but surely if the burden be met and it be shown that officials have acted in "bad faith," the public welfare is ill-served by the shield of absolute immunity.

The Supreme Court of Arizona came to precisely this conclusion in *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

> ". . . The question arises whether such unbridled discretion is appropriate in our modern society . . . We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society . . . The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking, outrageous actions. In any case, democracy by its very definition implies responsibility . . . In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous . . . It is clear that the policy reasons

> for official immunity are much weaker than for judicial immunity. Thus, logic requires a lesser immunity; for immunity deprives individuals of a remedy for wrongdoing and should be bestowed only when at the level necessary. We hold that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and indeed is improper." *Id.* 1232-1233.

However, this Court is not asked to assess the general propriety of the absolute immunity doctrine. Rather, this Court must determine the impact of that doctrine on violations of fundamental constitutional rights. Appellants submit that no compelling state interest justify absolute immunity for administrative officials in this context.

II

CALIFORNIA GOVERNMENT CODE SECTION 845.8(a) IS UNCONSTITUTIONAL AS CONSTRUED BY THE CALIFORNIA COURT OF APPEAL

A. General

The Court of Appeal of the State of California interpreted Government Code §845.8(a) as a grant of absolute and total immunity to any person holding office as a member of the California Adult Authority. Such immunity must be regarded as a mandate to Respondents to exercise power in a reckless or malicious manner, both within and without the scope of their official duties. Petitioners contend that so construed or so applied to the facts of this case, Government Code §845.8(a) is

unconstitutional in that it permits the deprivation of life without due process.

B. Life Is A Fundamental Right

Life is a fundamental right expressly protected from deprivation by state action without due process as provided in the Fourteenth Amendment to the U.S. Constitution. Like those protections in the Bill of Rights which have been incorporated in the due process clause of the Constitution, the right to physical safety at the hands of the state is ". . . of the very essence of a scheme of ordered liberty . . . a 'principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

C. Due Process Demands That Life Not Be Denied Unless Justified By A Compelling State Interest

Recognizing that the right to life is a fundamental interest, and that California Government Code §845.8(a) did encourage and facilitate the deprivation of Petitioner's life, the question remains as to what the demands of due process are with respect to the facts of this case. Petitioners contend that life is a right so fundamental that its deprivation may be justified only by a compelling state interest.

This Court has recognized substantive rights of privacy, procreation, contraception, child-bearing, and free speech which can be limited only by a showing of a compelling state interest. Life, a right as fundamental as any recognized, deserves just as formidable a protective barrier.

In *Roe v. Wade*, 410 U.S. 113 (1973), Justice Blackmun, in discussing the protection afforded a woman's right to control her pregnancy, stated:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interst at stake. . . ." *Id.* at 155.

The Court of Appeal committed reversible error by holding that the state statute may abridge the fundamental right to life without a compelling state interest. The Court held that "there is a rational relationship between the state's purposes and the statute," (Opinion, page 8) and found that to be a sufficient basis for the constitutionality of the statute. Such holding was plain error and is sufficient grounds for reversal.

D. Government Code §845.8 Serves No Compelling State Interest In The Context Of This Case

An analysis of the state interest served by the absolute immunity doctrine shows that those interests are either not compelling or that absolute immunity is unnecessary to their accomplishment. One state interest which Government Code §845.8 serves is to allow members of the California Adult Authority to perform their jobs without the pressure and fear of civil suit. However, this interest is best served by a qualified immunity for the same reasons stated in discussing the appropriate extent of federal common law immunity and actions under 42 U.S.C. §1983, *infra*. In summary, those

reasons are that:

1. A good faith standard does not inhibit legitimate action by members of the California Adult Authority.

2. It is not in the public interest to encourage the reckless and malicious release of dangerous felons.

3. The fundamental interest at stake in this case is more important that the state's interest in protecting its officials' bad faith activity.

A second compelling state interest conceivably justifying Government Code §845.8 is the public safety. Here, a valid distinction must be drawn between suits by prisoners, where Government Code §845.8 has been construed by some circuits to grant absolute immunity, and suits by members of the public for injuries or death caused by paroled prisoners. There is a significant state interest in immunizing California Adult Authority members from suit by prisoners denied parole in that potential civil liability may cause board members to parole dangerous felons who should not be released. The public safety is therefore a compelling state interest which certainly justifies a qualified immunity, and which may justify an absolute immunity in suits by prisoners.

In contrast, a suit by a member of the public for injuries or death caused by a paroled prisoner discourages the reckless and malicious parole of felons. The state's interest in the public safety is best served by holding members of the California Adult Authority to a "good faith" standard of conduct, not by immunizing them from liability for the reckless and malicious release of dangerous felons into society.

A third compelling state interest is the right of a prisoner to a fair parole hearing. Potential civil liability to injured members of the public could cause members of the California Adult Authority to deny parole when it is justified. However, Petitioners believe that qualified immunity provides sufficient protection for the prisoner. All that is required of state officials is good faith, certainly a minimal standard of conduct. The prisoner has no legitimate interest in being paroled when a good faith appraisal of his record shows that he is not entitled to be released.

A grant of absolute immunity is not justified by any of these potentially compelling state interests in the context of a suit by an injured member of the public. When state interests impinge on fundamental rights, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . ." *Roe v. Wade,* 410 U.S. 113, 155 (1973). The legitimate state interests at stake in this case may be fully realized by a qualified immunity. Therefore, the broad sweep of Government Code §845.8 as construed by the Court of Appeals is unjustified and amounts to a denial of due process.

III

STATE PAROLE OFFICIALS HAVE QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR THEIR ACTS WHICH VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL MEMBERS OF THE PUBLIC PURSUANT TO 42 U.S.C. §1983

A. Appellants Have Alleged A Violation Of The Federal Civil Rights Act 42 U.S.C. §1983.

Appellants' Fifth Cause of Action of their FIRST AMENDED COMPLAINT is for damages for violation of Federal Civil Rights pursuant to 42 U.S.C. §1983.

That cause of action alleges that the acts of the individual Respondents, under color of state law, caused the death of MARY ELLEN MARTINEZ. To the extent that the Appellants can prove their allegations at trial with the requisite burden of proof, it is clear that Respondents' acts under color of state law subjected MARY ELLEN MARTINEZ to deprivation of a fundamental constitutional right without due process. Appellants have, therefore, stated the prima facie elements for a cause of action under 42 U.S.C. §1983.

B. The Only Issue Which Remains In Dispute Is Whether The Immunity Enjoyed By The Respondents Is Qualified Or Absolute.

The Court of Appeal of the State of California held that Respondents were immune from civil liability for their acts: "As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations

regarding parole and are immune from suit under the Civil Rights Act." In Paragraphs XV and XXVIII of their FIRST AMENDED COMPLAINT which are incorporated by reference in their Section 1983 cause of action, Appellants have pled facts alleging malice. (C.T. 104) The conclusion of the Court of Appeal is, therefore, that state parole officials are absolutely immune from suit under 42 U.S.C. §1983 even if their acts are done with malice and amount to wilful and wanton misconduct.

Appellants assert that these Respondents enjoy only a qualified immunity as to injuries to the public, which does not protect their acts done in bad faith.

C. Absolute Immunity Is Inappropriate To Civil Rights Actions Under 42 U.S.C. §1983.

The case of *Scheuer v. Rhoades*, 416 U.S. 232 (1974), illustrates the inappropriateness of applying absolute immunity in situations involving alleged civil rights violations. *Scheuer, supra*, involved an action brought under §1983 for the death of students killed by Ohio national guardsmen at Kent State University in May, 1970. Appellants brought suit against the governor, adjutant general and assistants because they:

> " 'Intentionally, recklessly, willfully, and wantonly' caused an unnecessarily deployment of the Ohio national guard on the Kent State campus . . . which resulted in the death of plaintiffs' decedents . . . the complaints alleged that each of the named defendants, in undertaking such actions, acted

> either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of the office." *Id.* at 235.

Chief Justice Burger, writing for a unanimous court, carefully analyzed the asserted justifications for immunity. Taking into account the need of high executive officials to act swiftly and promptly and to be able to rely on the information available to them, he concluded that:

> "Under the criteria developed by precedents of this court, §1983 would be drained of meaning if we were to hold that the acts of a governor or high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights' . . . These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.* at 247-248.

The reasons for limiting immunity which were advanced in the *Scheuer* case, *supra*, are equally applicable to the present fact situation. Indeed, defendants in *Scheuer* had a greater justifiable expectation that they would be immune from

liability than Respondents have. For one thing, the executive officers in *Scheuer* were forced by the nature of the situation to make a quick decision as to whether to release a potentially dangerous force into society based on the information available to them at the time. In contrast, Respondents could and should have taken every precaution, gathered whatever informtion was reasonably necessary for a fair and complete evaluation before releasing this certainly dangerous force into society.

The *Scheuer* situation is one in which the freedom to act is to be encouraged because any impediment to quick action may resound to the detriment of the public safety. Yet, the court correctly concluded that absolute immunity was unnecessary to achieve the requisite freedom of action. In contrast, in the parole of dangerous felons, the same considerations cut in the opposite direction. Greater freedom of action is a potential hazard to public safety. In this area of official conduct, it is in the public's interest to discourage precipitous action as well as the reckless and malicious action herein alleged. The rights of prisoners to a fair parole hearing are not prejudiced by the imposition of a "good faith" standard of conduct on parle board officials. But absolute immunity is a blank check which does nothing for the legitimate interests of prisoners or society, but rather encourages reckless and malicious action which endangers the public.

D. Qualified Immunity Has Been Applied To "Quasi-Judicial" Officials.

Courts have generally drawn a distinction among branches of government as to whether absolute or qualified immunity is appropriate. These distinctions have proven difficult to apply in the ever-growing "fourth branch of government," the bureaucracy. Our citizens have increasing contact with government in the form of administrations, authorities, boards, commissions and departments, which though nominally a part of the executive branch, perform legislative and judicial as well as executive functions. But even though bureaucratic bodies may perform judicial functions, the non-public nature of bureaucratic proceedings justifies application of a good faith requirement. The devices designed to protect abuse of the judicial process are generally absent from bureaucratic proceedings, including those of parole boards.

> "For years, the legislature has neglected its responsibility of providing guidelines for boards charged with parole decision making . . . the parole board is one of the last bastions of unchecked arbitrary power in America." California State Assembly, Report of the Select Committee on the Administration of Justice, Parole Board Reform in California, Order Out of Chaos, (1970).1/

1/ Justice Hugo Black once stated:

> "In the course of my reading-by no means confined to law-I have reviewed many of the world's religions. The tenets of many faiths hold the deity to be a trinity. Seemingly, the parole boards, by whatever names designated in the various states, have in too many instances sought to enlarge this to include themselves as members."

For just this reason, it is in the public interest to impose a minimum standard of conduct on these officials.

In *Wood v. Strickland,* 420 U.S. 308 (1975), two girls were suspended from high school for possession of intoxicating beverages at a school activity. The students brought an action for damages under 42 U.S.C. §1983 against the school board, claiming that their federal constitutional rights of due process had been denied under color of state law. Justice White's opinion for the court analyzed the nature of the particular officials:

> "As the facts of this case reveal, school board members function at different times in the nature of legislatures and adjudicators in the disciplinary process." *Id.* at 319.

Nevertheless, the court found absolute immunity unjustified:

> ". . . The judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcuseable deprivations." *Id.* at 320.

If the rights of high school students not to be expelled is of sufficient importance that school board members may be subjected to a minimum standard of conduct, then it is reasonable to expect that the life of a high school student is also of sufficient import that parole board members should be subjected to the same minimum standards. It must be underscored that the minimum standard of "good faith"

imposed by the qualified immunity test of the *Scheuer* and *Wood* cases imposes a heavy burden of proof upon Appellants. In addition to proving the elements of a cause of action under 42 U.S.C. §1983, they must show a lack of "good faith" on the part of Respondents. Thus, the question is properly framed as follows: Could MARY ELLEN MARTINEZ state a cause of action against a school board whose bad faith actions expelled her from school, but be barred from stating a cause of action against parole board members whose bad faith actions caused her death?

The *Wood* decision shows that it is appropriate to apply qualified immunity to government officials who are part of the executive branch, but who perform "quasi-judicial" functions. The school board in *Wood* was acting in much more of a judicial capacity than were Respondents herein. With respect to Appellants the individual named Respondents performed no judicial function whatsoever. Respondents' judicial function is in relation to the prisoner seeking parole. In relation to MARY ELLEN MARTINEZ, Respondents' actions are more akin to those of the defendants in *Scheuer, sura,* who made an intentional decision to send a dangerous force out into the public.

In *Stump v. Sparkman,* 435 U.S. 349 (1978) this Court split five-four on the issue of immunity for a state court judge who had ordered a fifteen year old girl sterilized. But the arguments in favor of absolute immunity for judicial officers is much stronger than that for parole officials. Parole board proceedings are not open to public attendance, are not reported and made a public record and lack many of the procedural protections of judicial hearings. The public has no

representation at such proceedings and cannot appeal a grant of parole. Under such circumstances it is appropriate to require good faith as a predicate to immunity for bridging fundamental constitutional rights.

CONCLUSION

Based on the foregoing authorities this Court has jurisdiction of this appeal under §1257(2), Title 28, United States Code.

Respectfully submitted,

THOMPSON, SULLIVAN,
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APPENDIX

COURT OF APPEAL - FOURTH DIST.
FILED
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IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

[Modification of Opinion.]

THE COURT:

The opinion in the above entitled matter filed on September 22, 1978 is modified as follows:

Starting with page 5, line 6, delete:

> "*Anderson v. State of California*, 83 Cal.App.3d 188, 196"; and on the same page, second paragraph, line 7, the word "which" in the quote should be in brackets as it is a substitution for the word "however," so the quote reads: "ministerial implementation of correctional programs [which] can hardly . . ."

COURT OF APPEAL - FOURTH DIST.
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

APPEAL from a judgment of the Superior Court of San Diego County. Louis M. Welsh and Douglas R. Woodworth, Judges. Affirmed.

George Martinez appeals the judgment following an order sustaining State's demurrer without leave to amend.

Richard June-Jordan Thomas was convicted on December 12, 1969 of attempted forcible rape. He was sent to Atascadero State Hospital for six months where he was designated a "Mentally Disordered Sex Offender" (MDSO), not amenable to treatment. He was sentenced to prison for from six months to 20 years in April 1970 and was paroled

five years later on condition he appear regularly at a "parole outpatient clinic." Five months after his release Thomas kidnapped and murdered Mary Ellen Martinez, a 15 year old.

George Martinez filed suit for his daughter's wrongful death and for civil rights violations in six causes of action alleging defendants were negligent in releasing Thomas, failed to supervise Thomas properly while he was on parole, violated the Federal Civil Rights Act[1]/ and failed to warn females Thomas was loose. He sought compensatory and punitive damages. We consider each cause of action in turn.

The first cause of action alleged the defendants were employed by the California Department of Corrections and the Adult Authority, had a duty to be reasonably careful in paroling prisoners and had breached that duty because no prudent, reasonable person knowing Thomas' history would have released him. Martinez says governmental immunity provided by Government Code section 845.8(a)[2]/ does not apply because the employees here were acting outside the course and scope of their employment. However, even if

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FOOTNOTE 1: 42 U.S.C.A. §1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FOOTNOTE 2: This statute states: "Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. (b) Any injury caused by: (1) An escaping or escaped prisoner; (2) An escaping or escaped arrested person; or (3) A person resisting arrest."

these employees abused their discretion by granting parole knowing Thomas had tortured two girls in attempting to rape them, was an untreatable MDSO with a recommendation of no parole, had received no psychiatric treatment during his incarceration and had no psychiatric evaluation after his request this does not make them liable. The statute by its own terms releases an employee from any liability stemming from the exercise of his discretion in determining whether a prisoner should be released (see Gov. Code §820.2; see *State of California v. Superior Court*, 37 Cal.App.3d 1023, 1026).

As for the charge these employees were not acting within the scope of their employment, there are no allegations they were doing anything other than what they were hired to do, that is, determine when prisoners are to be paroled (*Burgdorf v. Funder*, 246 Cal.App.2d 443, 448).

In his second cause of action Martinez says the State's employees were negligent in "performing ministerial acts of release." He claims Government Code section 845.8(b) grants employees absolute immunity for discretionary and ministerial acts when dealing with escapees, while section 845.8(a) covers only those injuries flowing from "determinations" about parole (see fn. 2; *County of Sacramento v. Superior Court*, 8 Cal.3d 479). In sort, he says section 845.8(a) confers discretionary immunity but not absolute immunity. In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity (*State of California v. Superior Court, supra*, 37 Cal.App.3d 1023, 1027-1028). Not covered are ministerial acts in carrying out the decision to release the person, and an allegation of negligence must be determined on a case-by-case basis (*Johnson v. State of California*, 69 Cal.2d 782, 797; see *Morgan v. County of Yuba*, 230 Cal.App.2d 938, 942). In this count Martinez does not allege

negligence occurring after the decision to release Thomas. The complaint, by reference, incorporates allegations from the first count that: the employees knew Thomas had tortured the girls during the attempted rapes; he had been declared an untreatable MDSO; it had been recommended he not be paroled; he had received no psychiatric treatment; and, had no psychiatric evaluation within 30 days of his request. All of these acts or omissions are part of the discretionary act of releasing a prisoner and come within the government's immunity.

In this third cause of action Martinez says the State was negligent in failing to warn females using Tecolote Canyon of the danger now that Thomas was released. At oral argument he agreed this count should be dismissed because there was no continuing relationship between the State and the victim (*Whitcombe v. County of Yolo*, 73 Cal.App.3d 698, 713; *Anderson v. State of California*, 83 Cal.App.3d 188, 196).

In his fourth cause of action Martinez claims the State wantonly, wilfully and maliciously failed to supervise Thomas. The decision on what conditions to impose upon a parolee including, for example, the imposition of a certain amount of supervision is part of the determination in section 845.8(a) which is immune from liability. However, supervision of a parolee consists of the "ministerial implementation of correctional programs which can hardly . . . be isolated from discretionary judgments in adopting such programs." (See *County of Sacramento v. Superior Court, supra*, 8 Cal.3d 479, 485). Thus, for correctional activities, both discretionary decisions and their ministerial implementation come under the blanket of immunity (*Whitcombe v. County of Yolo, supra*, 73 Cal.App.3d 698, 714) and Martinez has not stated a cause of action.

Martinez's fifth cause of action alleges violation of the Federal Civil Rights Act (see fn. 1), saying the acts of the individual respondents under Penal Code sections 5075 and 5077[3]/ caused and deprived Mary Ellen of her life and liberty. He points out that governmental immunity is not an absolute bar to such a suit (*Kletschka v. Driver*, 411 F.2d 436, 448). However, official acts are privileged if they were done within the scope of their official duties (*Ahlstrand v. Lethert*, 319 F.Supp. 283, 284). As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the Civil Rights Act (*Fitzgerald v. Procunier*, 393 F.Supp. 335, 343).

Martinez claims Mary Ellen's death resulted from actions and omissions above and beyond the actual processing of applications for parole, such as the failure to warn, and the failure to supervise Thomas. In addition, he argues that public policy considerations support the application of a restricted immunity with regard to civil rights actions brought by injured citizens. We weigh his arguments propounding liability against the local rule of immunity (*Kletschka v. Driver, supra*, 411 F.2d 436, 448). The factors Martinez cites against absolute immunity are: an official who acts maliciously should be liable; it may not be in the public's interest always to have an official execute his duties with the utmost zeal; other social values, for example, the right to life and physical safety, may be more important than immunity; and indemnity by the State reduces the consequences of the liability of public officials, However, there

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FOOTNOTE 3: Section 5075 concerns the members, appointment, term, vacancies and qualifications of persons on the Adult Authority while section 5077 deals with granting and revoking of parole by the Adult Authority.

are no facts here to show malice. Thomas was eligible for parole; the members of the Adult Authority determined he was ready for it. There is no sure formula for the members to know when a convict is rehabilitated and ready to reenter society. Yet it is important for the well-being of both society and the individual, to release persons as soon as they are rehabilitated. It is to society's advantage to try a variety of rehabilitative efforts and to use the maximum flexibility in facilitating the individual's reentry into society. In order to accomplish these aims it is necessary for public officials to make these decisions without fear they will be liable if they are wrong (see *Whitcombe v. County of Yolo, supra*, 73 Cal.App.3d 698, 710, fn. 11, 716). There is no liability for these injuries as pleaded under the Civil Rights Act.

In his sixth cause of action Martinez charges the State was negligent in failing to revoke Thomas' parole, supervise him properly and warn young females after it learned of its agents' unauthorized acts in releasing him. Since the acts of its employees are covered by governmental immunity, as discussed earlier, the State is not liable.

Martinez says the statute, Government Code section 845.8(a), is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed v. City & County of San Francisco*, 237 Cal.App.2d 23, 24). The California Tort Claims Act as a whole (Gov. Code §§810 et seq.) has been found constitutional (*Datil v. City of Los Angeles*, 263 Cal.App. 2d 655, 660-661). The stated purpose of section 845.8(a) is to allow correctional personnel to make determinations of release or parole unfettered by any fear or tort liability (Law Rev. Com. Comment). To

impose tort liability would have a chilling effect on the decision making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the State's purpose and the statute.

Martinez says the trial court abused its discretion in sustaining the demurrers without leave to amend. However, leave to amend is properly denied when the facts are not in dispute, the nature of the claim is clear but there is no liability under substantive law (*Sackett v. Wyatt*, 32 Cal.App.3d 592, 603). Here the only questions were legal ones: whether the immunity of Government Code section 845.8(a) applied, whether *Johnson v. State of California, supra*, 69 Cal.2d 782, 797) applied, whether the Federal Civil Rights Act applied and whether the statute was constitutional. Under the facts as stated there is no liability here and it would be futile to permit further amendment.

The judgment is affirmed.

Brown
P.J.

WE CONCUR:

Colaw
J.

Whiney
J.